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In the Supreme Court of the United States

OCTOBER TERM, 1951

FEDERAL POWER COMMISSION, *Petitioner*,

v.

IDAHO POWER COMPANY.

On Petition for a Writ of Certiorari to the Court of Claims

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 483

FEDERAL POWER COMMISSION, *Petitioner,*

v.

IDAHO POWER COMPANY.

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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1. Respondent's brief in opposition contends that the petition was not filed within the statutory time on the theory that the judgment of May 10, 1951 (R. 73), fixed the filing date. The May 10th judgment was modified on September 21, 1951 (R. 76-77), and was recalled on September 24, 1951 (R. 77). The petition was filed within 90 days of September 21, 1951. Since the substance of the earlier judgment was modified and the judgment itself recalled, it is submitted that the

time for filing the petition runs from the date of the order of modification and not from the date of the order modified.

Where a judgment has been modified to correct other than clerical or formal errors, the time for appeal runs from the date of the modification and not the original judgment. *Zimmern* v. *United States,* 298 U. S. 167; *United States* v. *Gomez,* 1 Wall, 690, 700. In fact, consideration on its merits of an untimely petition for rehearing, suspends the time for appeal until it has been acted upon, even without modification of the order or judgment. *Bowman* v. *Loperena,* 311 U. S. 262, 266; cf. *Pfister* v. *Finance Corp.,* 317 U. S. 144, 149-150.

It cannot be seriously urged that the substance of the May 10th judgment was not modified or that petitioner's motion for clarification was not entertained.[1] The original judgment directed that the Commission's order "be modified, and that this cause be, and it is hereby, remanded to the Federal Power Commission for the entry of an order in accordance with the opinion of this Court"

[1] Denoting the motion as one for clarification rather than rehearing is without significance. The effect of the modification of a judgment is the same without any motion at all (*Zimmern* v. *United States,* 298 U. S. 167), and a motion to amend findings has been given the same effect as a motion to amend the judgment since it "was not addressed to mere matters of form but raised questions of substance since it sought reconsideration of certain basic findings of fact and the alteration of the conclusions of the court." *Leishman* v. *Associated Electric Co.,* 318 U. S. 203, 205.

(R. 73). The Court's order of September 21, however, directed "that the judgment and decree entered in this cause on May 10, 1951, be, and it is hereby, amended to read" that the Commission's order "be, and it is hereby, modified by striking therefrom paragraph (F) thereof, and that the order of the Federal Power Commission herein as thus modified be, and it is hereby, affirmed" (R. 76-77).

The effect of the modified judgment was to direct the issuance of the license without the contested paragraph, whereas the language of the original judgment appeared to leave to the Commission's discretion the issuance of the license on such other conditions as it deemed appropriate, or not at all, so long as it did not require the company to interconnect its transmission facilities with Government lines.

The fact that the Commission's motion, although filed out of time, was entertained is established by the order of modification, which recites that it was done "on consideration of respondent's motion for clarification of the opinion and judgment of this Court" (R. 76) and by the recall of the certified copies of the original opinion and judgment (R. 77).[2] Under the governing authorities,

[2] Failure of the court to direct a change in the date of the original order is of no consequence, since even the issuance of a *nunc pro tunc* order does not vitiate the effectiveness of the date of actual modification. *United States* v. *Gomez*, 1 Wall. 690, 700.

therefore, the judgment based upon the motion for clarification must be considered the final judgment for purposes of review.[3]

2. Respondent asserts that the Commission had previously approved its project, and, accordingly, that no question is presented as to the Commission's primary jurisdiction to make the necessary statutory findings. But the Commission's prior findings and order of approval related to the dam and power plant, not to the transmission lines involved in this case (R. 12). The Commission's order stated specifically (R. 16):

> (g) The Commission reserves the right to determine at a later date what transmission facilities should be included in the license as part of the project.

This provision in the order was doubtless prompted by respondent's general reference to "transmission lines" in its application for a license. There was no specific mention of the lines presently involved, almost 200 miles in length and crossing Government lands for approximately 125 miles, until a year later, after the unsuccessful effort to obtain a permit from the Department of the Interior.

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[3] A fuller discussion of the authorities on this question is contained in the Government's reply to respondent's brief in opposition filed earlier this month in *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Company*, No. 479, this Term.

Moreover, it is clear that the Commission did not believe that its determination made with respect to the original license application controlled with respect to the amended application for these transmission lines. The motion for clarification filed in the court below by the Federal Power Commission over the signature of its general counsel stated (R. 74):

> The determination of whether a license should issue without paragraph (F), or what license conditions, if any, may be otherwise appropriate, is a determination for which the Commission has been given primary responsibility and the responsibilities of the Commission under the Federal Power Act should not be predetermined by this Court.

Respectfully submitted,

PHILIP B. PERLMAN,

Solicitor General.

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